



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

'AUG - 1 2007

Bill Durston, MD  
Durston for Congress  
P. O. Box 190  
Rancho Cordova, CA 95741

RE: MUR 5886

Dear Dr. Durston:

On July 25, 2007, the Federal Election Commission reviewed the allegations in your complaint dated November 27, 2006, and found that on the basis of the information provided in your complaint, and information available to the public, there is no reason to believe Democratic Voters Choice violated 2 U.S.C. § 441h, a provision of the Federal Election Campaign Act of 1971, as amended. Accordingly, on July 25, 2007, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's finding, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler".

Mark D. Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

27044174211

## FEDERAL ELECTION COMMISSION

### FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Democratic Voters Choice

MUR: 5886

#### I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Bill Durston. *See* 2 U.S.C. § 437g(a)(1). Based on the complaint and other available information, there is no reason to believe that Democratic Voters Choice violated 2 U.S.C. § 441h in connection with a slate mailer sent prior to the November 2006 general election.

#### II. FACTS

Complainant Bill Durston was the Democratic candidate for the House of Representatives in California's Third Congressional District in the 2006 election. Durston's opponent in the Third Congressional District was Representative Dan Lundgren, the Republican incumbent.

Democratic Voters Choice ("DVC") is an unincorporated slate mailer organization registered with the California Fair Political Practices Commission. It is also organized under Section 527 of the Internal Revenue Code and lists its purpose as "Voter Education and Awareness." *See* IRS Form 8871, filed July 31, 2000. The principals associated with DVC also appear to operate a parallel slate mailer organization targeted towards Republicans, Citizens for Good Government. The websites for DVC and Citizens for Good Government contain almost identical content and include the same contact information. Reports filed with the California Fair Political Practices Commission list the same treasurer for both organizations. DVC is not registered with the Commission and did not submit a response to the complaint.

At issue in this matter is a mailer sent by DVC to voters in California's Third Congressional District prior to the 2006 general election. *See* Attachment 1. The mailer advocates the election of large number of non-federal candidates, as well as two federal candidates, Dianne Feinstein and Dan Lungren. The complainant alleges that the DVC mailer is styled to appear as a Democratic Party mailer. *See* Complaint at 1. Complainant further argues that the mailer "represents a deliberate attempt to trick Democratic voters into voting for the Republican candidate" and that the mailer "unfairly affected" his chances of winning the election. *See id.*

The DVC mailer at issue in this matter included statements such as "Attention Democrats," "Vote Democratic" and "The Democratic Party has always been the party of new ideas and strong leadership" and listed Democratic candidates as the choices for various state offices and for U.S. Senate. The front of the mailer also contains the phrase "The Democratic Party was Established in 1823" along with the picture of a donkey, the symbol of the Democratic Party. At the bottom of that same page, the mailer includes a "Notice to Voters" which includes the following information, "This document was prepared by Democratic Voters Choice, not a political party organization." The mailer also listed Durston's Republican opponent, Dan Lungren, as the choice for U.S. Congress and recommended positions on state ballot propositions. Complainant represents that some of the recommended positions on the state ballot propositions were contrary to the platform of the state Democratic Party. *See* Complaint at 1. In reports to the California Fair Political Practices Commission, DVC reported spending \$20,875 for printing in 2006. *See* California Fair Political Practices Commission Form 401 (2006). It is unclear what portion of these printing costs are attributable to the mailer at issue in this matter.

### III. ANALYSIS

The Act prohibits any person who is a candidate or an employee or agent of such candidate from fraudulently misrepresenting himself as speaking, writing, or acting for or on behalf of another candidate or party on a matter that is damaging to that candidate or party. *See* 2 U.S.C. § 441h(a); *see also* 11 C.F.R. § 110.16(a). The Act also bans the fraudulent solicitation of funds by any person and prohibits any person from participating in, or conspiring to participate in any plan, scheme, or design to make such fraudulent misrepresentations in soliciting contributions and donations. *See* 2 U.S.C. § 441h(b); *see also* 11 C.F.R. § 110.16(b).

To establish a violation of 2 U.S.C. § 441h(a), there must be a communication that contains fraudulent misrepresentations by a candidate or employees or agents of a candidate. The complaint in this matter does not provide any information suggesting the elements of a violation under 2 U.S.C. § 441h(a). The communication does not appear to meet the Act's threshold requirement that a candidate or the employee or agent of a candidate be involved in the alleged misrepresentation. The complainant does not allege that DVC is the employee or agent of any candidate, and the available information does not support such a conclusion. Reports filed with the California Fair Political Practices Commission show that neither Dianne Feinstein nor Dan Lungren, the two federal candidates listed in the mailer, made any payments to DVC. Accordingly, there is no basis to conclude that DVC violated 2 U.S.C. § 441h(a) by sending the mailer.

The Commission has recognized that, in some cases, "the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation, since the disclaimer discloses the source of the mailer." *See* Statement of Reasons by Commissioners Weintraub, McDonald, Thomas and Toner in MUR 5089 (Matta Tuchman for Congress) at 2.

Because DVC does not meet the threshold for liability under 2 U.S.C. § 441h(a), we need not address whether the disclaimer, which identifies DVC as the source of the mailer and notes that DVC is not affiliated with any political party, would be sufficient to negate the intent necessary to establish fraudulent misrepresentation.

Finally, there is also no basis to proceed against DVC under 2 U.S.C. § 441h(b). While the prohibition on fraudulent solicitations in 2 U.S.C. § 441h(b) extends to all persons, and not just to candidate or employees or agents of candidates, this provision also does not cover the DVC mailer because the mailer does not solicit any contributions or donations.

Because the mailer by DVC does not meet the requirements for fraudulent misrepresentation under the Act, the Commission found that there was no reason to believe that Democratic Voters Choice violated 2 U.S.C. § 441h and closed the file in this matter.